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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 863.

THE CITY OF NEW YORK,

Petitioner,

—against—

MICHAEL FEIRING, Trustee in Bankruptcy of NATIONAL STUDIOS, INC.

BRIEF OF TRUSTEE, RESPONDENT.

BENJAMIN SIEGEL,
Attorney for Trustee, Respondent.

BENJAMIN SIEGEL,
BENJAMIN BROWNSTEIN,
On the Brief.

THE COURT PRESS, N. Y. C.

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BRIEF OF TRUSTEE, RESPONDENT.

The Issue Involved and Questions Raised.

The bankrupt sold goods at retail to its customers. The City of New York, petitioner herein, filed a proof of debt for "taxes" under the New York City Sales Tax, known as Local Law 24 of 1934, and hereinafter referred to as Local Law. The City of New York and the Trustee in Bankruptcy stipulated that the amount of said claim was $796 of which only the sum of $60 in taxes was collected by the bankrupt from its customers, and no part thereof came into the possession of the Trustee in Bankruptcy (R. 12).

The City of New York demanded priority of payment of said claim and the Trustee objected thereto.

The learned Referee in Bankruptcy, after finding that the obligation to the City of New York was a tax legally due and owing by the bankrupt, further determined as follows:

> "Had the City of New York elected to claim for the vendor's liability as its collection agent its claim could

have been allowed only as a general claim. The objection of the trustee is therefore overruled and the claim allowed as a tax claim entitled to the priority granted by Section 64(a) of the Bankruptcy Act" (R. 15).

The District Court reversed the Referee and the Circuit Court of Appeals sustained the District Court, holding that the City's claim was for a debt and not a tax and denied priority.

Respondent contends that said claim is not entitled to priority of payment under the Bankruptcy Act for reasons as follows:

1. Under Section 64(a) of the Bankruptcy Act, as amended by 52 Stat. 874 (known as the Chandler Act) *debts* owing to persons entitled to priority under the laws of the State, except to a landlord, are no longer entitled to priority in bankruptcy.

2. The claim of the City of New York is for a debt and not a tax and the previous holding of the Circuit Court of Appeals (2nd Circuit) to that effect in *Matter of Lazaroff*, 84 Fed. (2d) 982, was not overruled by this Court in its reversal of the *Lazaroff* case and that such reversal was not a determination that the obligation of the vendor under the Local Law was a tax.

3. The subsequent interpretation of the Local Law and *Matter of Atlas Television Co.*, 273 N. Y. 51, by the New York Courts, and by this Court in *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, and in briefs heretofore submitted by petitioner, confirms respondent's contention that the tax is imposed upon the purchaser and not the vendor, whose obligation to the City is that of a tax collecting agent, as distinguished from a taxpayer.

4. The Bankruptcy Act was deliberately amended to eliminate State priorities in view of the ever mounting priority claims.

5. Public policy does not warrant a reversal of the judgment of the Court below.

POINT I.

Debts owing to persons entitled to priority under the laws of a state are no longer entitled to priority under the Bankruptcy Act as amended by the Chandler Act.

Section 64(b)6 of the Bankruptcy Act prior to its amendment under the Chandler Act granted priority to taxes, and Section 64(b)7 granted priority to certain debts (after taxes) as follows:

> "debts owing to any person who by the laws of the States or the United States is entitled to priority."

Under this provision a debt owing to a person entitled to priority by State Law was allowed priority in bankruptcy.

The Chandler Act amended this provision as to debts entitled to priority, by omitting the words "the State or" and the amended provisions of the Bankruptcy Act, insofar as they pertain to taxes and debts entitled to priority, are now contained in Section 64(a) subdivisions 4 and 5 as follows:

> "Sec. 64(a).—The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be
>
> * * *

(4) Taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof: Provided, That no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court: And provided further, That, in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court; and

(5) Debts owing to any person, including the United States, who by the laws of the United States is entitled to priority, and rent owing to a landlord who is entitled to priority by applicable State law: Provided, however, That such priority for rent to a landlord shall be restricted to the rent which is legally due and owing for the actual use and occupancy of the premises affected, and which accrued within three months before the date of bankruptcy."

The effect of this amendment is to withdraw priority in bankruptcy from a debt even though such debt is allowed priority by State Law except as to a landlord's claim.

POINT II.

The claim of the City of New York against a vendor for Sales Tax under the Local Law is a debt and not a tax.

The very provisions of the Local Law cogently tend to establish that the tax is imposed upon the purchaser and not the vendor and that the obligation of petitioner is therefore for a debt and not a tax. Such provisions are as follows:

"the tax to be collected shall be stated and charged separately from the sale price * * * and shall be paid by

the purchaser to the vendor, for and on account of the city of New York * * *" (Sec. 2).

"Where a purchaser has failed to pay and a vendor has failed to collect a tax * * * then * * * such tax shall be payable by the purchaser directly to the comptroller and it shall be the duty of the purchaser to file a return thereof with the comptroller and to pay the tax imposed thereon to the comptroller within fifteen days after such sale was made or service rendered" (Sec. 2).

"The comptroller may, * * * provide by regulation that the purchaser shall file returns and pay directly to the comptroller the tax herein imposed * * *" (Sec. 2).

"The comptroller may require any vendor required to collect the tax * * * to file with him a bond * * * as to solvency * * * to secure the payment of any tax * * *" (Sec. 6).

"The comptroller shall refund any tax erroneously or illegally collected and paid * * *. Such application may be made by the person upon whom such tax was imposed, or by the vendor who collected and paid such tax to the comptroller, if such vendor establishes to the satisfaction of the comptroller * * * that he has repaid to the purchaser the amount for which application for refund is made" (Sec. 10).

"* * * every vendor required to collect the tax * * * shall file with the comptroller a certificate of registration * * * who shall within five days after such registration issue without charge to each such vendor a certificate of authority empowering such vendor to collect the tax from the purchaser * * *" (Sec. 14).

Section 15 provides that the vendor may not absorb the tax and renders the vendor subject to criminal penalties in the event he fails to collect the tax from the purchaser.

The issue as to whether the claim of the City is for a tax or a debt was first determined in *Matter of Lazaroff* (C. C. A. 2nd Cir.), 84 Fed. (2d) 982. That case was de-

cided prior to the amendment of Section 64 of the Bankruptcy Act by the Chandler Act. The Circuit Court denied priority and expressly held that the obligation was not a tax, nor such a debt which was entitled to priority by State Law.

Certiorari in the *Lazaroff* case was denied (299 U. S. 583) but subsequently this Court granted a petition for re-hearing and in a *per curiam* opinion (299 U. S. 522) stated as follows:

> "January 18, 1937. *Per Curiam*: The motion for leave to file a petition for rehearing is granted. The order heretofore entered on October 26, 1936, denying the petition for writ of certiorari herein is vacated, and the petition for writ of certiorari is granted. The decree of the Circuit Court of Appeals is reversed and the case is remanded to the District Court for further proceedings. *Re*: *Atlas Television Co.*, 273 N. Y. 51, 6 N. E. (2d) 94 (decided December 31, 1936)."

The *Atlas Television* case arose in the State court in an assignment proceeding for the benefit of creditors. The City there urged as it did in the *Lazaroff* case that its claim for sales tax against the vendor was entitled to priority under the laws of the State of New York by virtue of its alleged sovereign powers in the exercise of the authority granted to it by the State, and also because it was a tax.

The New York Court of Appeals found that the equities in the case warranted granting priority to the City, but in granting such priority, the Court did not squarely determine that it did so because the obligation was a tax, but merely held that the City was entitled to priority regardless of whether the obligation be characterized as a tax or a debt because even as a debt the City was entitled

to priority as it was exercising a function of the State under authority of the State, and in its opinion, stated as follows:

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"Whether the city is entitled to a priority depends upon whether its claim is that of the sovereign people, acting through the agency of the city, or is that of the city acting as a semi-private municipal corporation. Taxation is an attribute of sovereignty and the city acts as sovereign when it imposes an obligation upon its inhabitants to contribute to the expenses of government and when it collects that obligation. That is true no less if we denominate the obligation by some other term than a 'tax', so long as it constitutes an obligation created by the sovereign to contribute to the expense of government. Distinctions resting solely in words should carry here no legal consequences. We must look to the substance of the obligation."

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"* * * Though the vendor is required, at least in most cases, to collect the tax from the purchaser, 'for and on account of the City', the purpose of that provision is to place the incidence of the tax immediately on the consumer."

Had the Court of Appeals intended to decide that the claim of the City was for a tax as distinguished from a debt, it could have readily said so in unequivocal language, but this the Court did not do.

We, therefore, respectfully urge that the subsequent reversal of the *Lazaroff* case by this Court was not a determination that the obligation of the vendor was a tax, but was only intended to follow and conform to the law of the State of New York enunciated by the New York

Court of Appeals that the obligation of the vendor as a debt was entitled to priority under the laws of the State of New York, and therefore entitled to priority under the Bankruptcy Act then in force.

The foregoing interpretation of the effect of the reversal of the *Lazaroff* case, is supported by an examination of the petition which The City of New York submitted to this Court when it requested a re-hearing of the *Lazaroff* case. In that petition in referring to the *Atlas Television* case, it urged as follows:

> "Your petitioner desires to point out, moreover, that even if the decision of a State Court on whether a claim is or is not a tax be deemed not binding on the Bankruptcy Court, still the decision of the State Court that the City is 'a person who by the laws of the States * * * is entitled to priority' is very definitely binding on the bankruptcy court by 64(b) (7) of the National Bankruptcy Act."

It thus clearly appears that in its renewed application for certiorari to this Court, the City of New York urged a reversal on the ground, either that the obligation was a tax due and owing by the bankrupt, or was a debt which the New York Court of Appeals in the *Atlas Television* case held was entitled to priority under the laws of the State.

Respondent's contention that the tax is imposed upon the purchaser and not the vendor, is further supported by recent opinions of the New York Court of Appeals and by this Court in the following cases:

Matter of Kesbec, Inc. v. *McGoldrick,* 278 N. Y. 293;

Matter of Merchants Refrigerating Co. v. *Taylor,* 275 N. Y. 113;

Matter of United Autographic Reg. Co. v. *McGoldrick,* 260 App. Div. 157, affirmed without opinion, 285 N. Y. 19;
McGoldrick v. *Berwind-White Coal Mining Co.,* 309 U. S. 33.

In *Matter of Kesbec, Inc.* v. *McGoldrick* (*supra*), the Court in interpreting the Local Law stated, as follows:

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"* * * The sales tax was not imposed on the vendor. It fell upon the purchaser (*Matter of Merchants Refrigerating Co.* v. *Taylor,* 275 N. Y. 113, 124) * * *"

In *Matter of United Autographic Register Co.* v. *McGoldrick,* 260 App. Div. 157, affirmed 285 N. Y. 19, Mr. Justice Dore, who rendered the majority opinion for the Appellate Division construed the Local Law as follows:

"The ultimate burden of the sales tax in question both in form and in substance is a tax (measured by the sales price) upon the New York city purchaser of the petitioner's commodities and not on the vendor, petitioner herein. * * * The *taxpayer* in this case is not the petitioner, an Illinois corporation, but the New York city purchaser." (Italics ours.)

In *McGoldrick* v. *Berwind-White Coal Mining Co.* (*supra*), this Court sustained the constitutionality of the New York City Sales Tax Law and stated, as follows:

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"* * * Another clause of Section 2 commands that the tax 'shall be paid by the purchaser to the vendor for and on account of the City of New York'. By the same clause the vendor who is authorized to collect the tax, is required to charge it to the purchaser, separately from the sales price; and is made liable, as an insurer, for its payment to the city.

* * * * * * * *

The ultimate burden of the tax, both in form and in substance, is thus laid upon the buyer, for consumption, of tangible personal property, and measured by the sales price. * * *"

(Page 44)

"The duty of collecting the tax and paying it over to the Comptroller is imposed on the seller in addition to the duty imposed upon the buyer to pay the tax to the Comptroller when not so collected. Such, in substance, has been the construction of the statute by the state courts (*Atlas Television Co.*, 273 N. Y. 51, 6 N. E. (2d) 94, 34 Am. Bankr. Rep. (N. S.) 7; *Merchants Refrigerating Co.* v. *Taylor*, 275 N. Y. 113, 9 N. E. (2d) 799; *Kesbec* v. *McGoldrick*, 278 N. Y. 293, 16 N. E. (2d) 288, 119 A. L. R. 536)."

Section 10 of the Local Law, which governs an application for a refund of the tax, defines the person upon whom the tax is imposed as being one other than the vendor, and said section reads as follows:

"Sec. 10. Refunds. The comptroller shall refund any tax erroneously or illegally collected and paid to him if application therefor shall be made within one year from the payment thereof. *Such application may be made by the person upon whom such tax was imposed, or by the vendor who collected and paid such tax to the comptroller if such vendor establishes to the satisfaction of the comptroller, under such regulations as he may prescribe, that he has repaid to the purchaser the amount for which application for refund is made.*" (Italics ours.)

It is significant that the statute provides that the application for the refund may be made by "the person upon whom such tax was imposed or by the vendor * * * if such vendor establishes * * * that he has repaid to the

purchaser the amount for which application for refund is made".

The only logical interpretation of such language is that the tax is imposed upon a person other than the vendor, and the New York Courts have so interpreted the statute, holding that the taxpayer is the purchaser and that the vendor is only a tax collector.

This was clearly held in *Matter of United Autographic Register Co.* v. *McGoldrick* (*supra*), wherein Mr. Justice Dore said:

> "The taxpayer in this case is not the petitioner, an Illinois corporation, but the New York city purchaser."

To the same effect see *Socony-Vacuum Oil Co. Inc.* v. *City of New York*, 247 App. Div. 163, aff'd 272 N. Y. 668.

A similar conclusion was reached in *Matter of Kesbec* v. *McGoldrick* (*supra*). In that case a vendor had collected a sales tax based upon a formula furnished by the Comptroller and after collecting such tax paid the same to the Comptroller. The formula adopted by the Comptroller was thereafter declared illegal and upon a recomputation of the sales tax it appeared that the vendor had collected a sum in excess of the proper amount of the tax, and the vendor thereupon instituted a proceeding to recover the excess tax from the Comptroller to whom the vendor had paid the same.

The City resisted such application and in its brief urged that *the vendor was only a tax collector*, and by reason thereof was not the proper party to bring such a proceeding, as only a *taxpayer* could bring such a proceeding.

The Court of Appeals accepted the argument of the City and refused to return to the vendor the tax which the vendor had illegally collected and paid to the Comptroller, because the tax was not imposed upon the vendor but

upon the purchaser, and held that the purchaser who was the taxpayer was the one who could apply for the refund.

If the vendor is a taxpayer, as the City now urges, then certainly the vendor would be entitled to an unconditional refund of a tax erroneously paid by him to the Comptroller, but this has been denied to the vendor both by the statute and the interpretation thereof by the New York Courts.

The decision of the Circuit Court of Appeals in this case is not without precedent.

See

Nolte v. *Hudson Navigation Co.* (C. C. A. 2nd Cir.), 8 F. (2d) 859;
Commonwealth of Pennsylvania v. *York Silk Mfg. Co.*, 192 Fed. 81;
In re Waller, 142 Fed. 883;
In re General Merchandise Corporation of America (D. C. Penn.), 32 F. Supp. 805.

In re General Merchandise Corporation of America (*supra*) involved the Philadelphia Sales Tax Law which for all practical purposes is the same as the Local Law. The District Court disallowed priority of a claim of the City of Philadelphia for sales tax against the estate of a bankrupt vendor upon the ground that the tax was upon the purchaser and not the vendor. The District Court followed the decision of the Supreme Court of Pennsylvania in *Blauner's, Inc.* v. *Philadelphia*, 330 Pa. 340 which held that the purchaser was the taxpayer and the vendor was the tax collector.

The opinion in the case at bar has since been cited with approval by the Circuit Court of Appeals for the Second Circuit by a unanimous court *In re Independent Automobile*

Forwarding Corp. (decided March 17, 1941), F. (2d) . (Bankruptcy Law Service C. C. H. ¶53081.)

The question there involved was whether the obligation imposed upon an employer under Title VIII (Social Security Act) to deduct a certain per cent. from the wages of the employee and to pay the same to the United States, created a *debt* or a *tax* due and owing to the United States within the meaning of Section 64(a) (4) of the Bankruptcy Act. Title VIII imposed a tax upon wages of employees, and required that, "The tax imposed by Section 801 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid. Every employer required so to deduct the tax is hereby made liable for the payment of such tax * * *." In holding that the obligation thus created upon the employer was a *debt* and not a *tax*, the court stated as follows:

> "This part of the Social Security Act laid a tax upon the employees of this bankrupt measured by a percentage of their wages and not a tax upon the bankrupt. It was taxed to a like extent under Sec. 804 of Title VIII and the two taxes put the burden of social betterment upon both the employer and the employees. As to that part of these taxes which were thus imposed upon the employees the employer was, indeed, made a compulsory tax collector and made liable for the payment of such tax. The employer, however, was liable only as an agent bound to pay whether its duty to collect was performed or not. Such liability for a debt, instead of for taxes due and owing the government, does not form the basis of a claim entitled to priority under Sec. 64(a) (4). *Gulf Oil Corp.* v. *Grady*, 119 F. (2d) 178 (C. C. A. 2) (¶52,300); *The City of New York* v. *Feiring, Trustee,* F. (2d) (C. C. A. 2) decided March 1941; *In re General Merchandise Corporation of America,*

32 F. Supp. 805 (¶52,466). Accordingly the taxes assessed under Sec. 801 of Title VIII of the Social Security Act were erroneously allowed as a prior claim."

By analogy the Social Security Act and the Local Law are comparable because under both statutes the bankrupt is required to collect the tax from a third person and to pay the same to the taxing authority.

The foregoing decision dispels the argument of petitioner that where the obligation is imposed upon a debtor without his volition, there can be no distinction between a debt and a tax.

Petitioner's position, if we understand it correctly, is that all expressions of the various courts on the issue as to who is the taxpayer under the Local Law, are *dicta*, as the Courts were merely referring to the "incidence of the tax."

Dicta generally expressed and accepted by all Courts should have the force of an opinion.

This Court held in *McGoldrick* v. *Berwind-White Coal Mining Co.* (*supra*) that:

(Page 43)

"The ultimate burden of the tax, both in form and in substance, is thus laid upon the buyer, for consumption, of tangible personal property, and measured by the sales price. * * *"

But assuming that these expressions only relate to the "incidence of the tax", this Court in *Colorado National Bank* v. *Bedford*, 310 U. S. 41, enunciated the principle that:

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"The determination of the State Court as to the incidence of the tax has great weight with us and, when it follows logically the language of the act, as here, is controlling."

POINT III.

The argument now advanced by petitioner is in direct conflict with its position heretofore taken before this Court in *McGoldrick* v. *Berwind-White Coal Mining*, 309 U. S. 33.

We have carefully examined the brief submitted by the City in the *Berwind-White* case and are respectfully of the opinion that the City is definitely "going back" on the position which it took before this Court in the *Berwind-White* case and is now taking a diametrically opposite view.

To support our contention we quote the following excerpts from the brief heretofore submitted by the City of New York to this Court in the *Berwind-White* case:

(At page 7 of Brief)

> "The tax is imposed not on the seller but on the buyer. The statute makes this abundantly clear and the courts have so held. *Matter of Merchants Refrigerating Co.* v. *Taylor*, 275 N. Y. 113 (1937); *Matter of Kesbec, Inc.* v. *McGoldrick*, 278 N. Y. 293 (1938).
>
> The statute provides that the tax is payable 'by the purchaser to the vendor, for and on account of the City of New York' (Sec. 2). The vendor is liable for collection, filing of returns and payment over to the City and has 'the same right in respect to collecting the tax from the purchaser, or in respect to nonpayment of the tax by the purchaser as if the tax were a part of the purchase price of the property or service' (Sec. 2). The vendor is required to state and charge the tax separately from the sales price (Sec. 2). Failure to do so or failure to collect the tax as such renders the vendor subject to criminal penalties. It

is also a crime for the vendor to advertise that he is absorbing the tax (Secs. 2, 15). Where the vendor fails to collect the tax, the purchaser-consumer is required within fifteen days to file a return and pay the tax directly to the Comptroller, and the Comptroller is authorized to proceed directly against the purchaser for payment of the tax (Sec. 2)."

(At page 43 of Brief)

"B. THE TAX IS IMPOSED NOT UPON THE SELLER BUT UPON BUYERS LOCAL TO NEW YORK WHO CANNOT BE TAXED IN ANY OTHER STATE.

Quite apart from the local nature of the taxable event, there is another reason why this tax cannot be imposed in more than one state. The taxpayer is not the seller, but the local purchaser."

The foregoing statements were made by the City of New York in its brief in the *Berwind-White* case filed in this Court, and the position taken therein was followed by this Court when it sustained the constitutionality of the Local Law, basing its opinion upon the fact that the tax as such was imposed on the purchaser and not the vendor, and that therefore there was no interference with interstate commerce.

Mr. Chief Justice Hughes dissented from the majority opinion of this Court because he rejected the argument of the City that the tax was upon the purchaser and stated in his dissenting opinion as follows:

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"If the vendor must pay the tax whether or not he can recoup the amount from the purchaser, and the tax, as here, is assessed against the vendor, it would seem inadmissible to defend the tax upon the ground that it is a tax upon the purchaser."

This dissenting opinion emphasizes in bold relief the force of the majority opinion in holding that the tax was imposed on the purchaser and not the vendor, and that the City of New York is now taking a position entirely inconsistent with and diametrically opposed to that taken by it in the *Berwind-White* case.

To now hold that the tax is imposed upon the vendor would be inconsistent with the decision of this Court in the *Berwind-White* case, and would cast doubt upon the decision of this Court declaring the Local Law to be constitutional.

POINT IV.

Whether a state statute which creates a tax does in fact constitute a tax within the meaning of the Bankruptcy Act is a federal question to be determined by the Bankruptcy Court.

The principle long established in *Swift* v. *Tyson*, 16 Pet. 1, 10 L. ed. 865, that the Federal Court is not bound to follow the law of the State was recently overruled by this Court in *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, wherein this Court held that the Federal Court was bound to follow the law of the State on all questions, *except* in matters governed by the Federal Constitution or by the Acts of Congress, and Mr. Justice Brandeis who delivered the opinion for the Court stated at page 78, as follows:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State."

The instant case involves the interpretation of an Act of Congress because the City is seeking priority not by

virtue of any State law but by reason of a claim asserted under the Acts of Congress relating to bankruptcy.

Under Section 64(a) of the Bankruptcy Act, the amount and legality of tax claims must be determined by the Bankruptcy Court, and in *New Jersey v. Anderson,* 203 U. S. 483, this Court interpreted this section, as follows:

(Pages 491 and 492)

> "* * * a state court, while entitled to great consideration, cannot conclusively decide that to be a tax within the meaning of a Federal law providing for the payment of taxes, which is not so in fact. The section (64a) itself declares that, in case of disputes as to the amount or legality of any such tax, they shall be heard and determined by the court. The State court may construe a statute and define its meaning, but whether its construction creates a tax within the meaning of a Federal statute, giving a preference to taxes, is a Federal question, of ultimate decision in this Court."

Regardless of the interpretation of the *Atlas Television* case, the issue whether the tax imposed by the City Sales Tax Law does in fact constitute a tax upon a vendor within the meaning of the Bankruptcy Act giving preference to taxes, is a Federal question to be determined exclusively by the Federal Court, and the determination of the State Court with respect thereto is not conclusive in that respect.

The Circuit Court of Appeals below having twice held that the Local Law does not impose a tax upon the vendor within the meaning of Section 64(a) of the Bankruptcy Act, its determination should be followed.

POINT V.

The cases cited by petitioner are distinguishable.

In none of the New York cases which involved the construction of the Local Law, except the *Atlas Television* case, the *Lazaroff* case and the case at bar, was the question considered as to whether the obligation of a vendor under the statute was *qua* tax or *qua* debt. The *Lazaroff* case and the case at bar squarely held it to be *qua* debt. The *Atlas Television* case failed to pass on the question because the conclusion which the Court arrived at was the same regardless of whether the obligation be a tax or a debt, for even as a debt the City was entitled to priority under state law.

The cases which have been cited by petitioner are for the most part cases in other jurisdictions involving different statutes, and do not conflict with the decision in this case. These cases may briefly be distinguished as follows:

The case of *Queens Vending Corp.* v. *City of New York*, 94 N. Y. L. J. 318 (July 31, 1933) aff'd 246 App. Div. 594, has no application, because in that case the issue was not raised as to whether the liability of the vendor was *qua* tax or *qua* debt. The court there merely determined that where the Comptroller pursuant to Section 3 of the Local Law, had fixed a price below which the vendor need not collect the tax from the purchaser, that the failure of the vendor to collect such tax from the purchaser on sales below such price, did not violate that portion of the Local Law which made it unlawful for the vendor to absorb the Sales Tax. The fact that it is unlawful to absorb the tax, is proof that the tax is not upon the vendor.

Matter of David Brown Printing Co. Inc., 285 N. Y. 47, likewise did not decide whether the claim of the City of New York was *qua* tax or *qua* debt because such issue was not there involved. That case merely determined that in a proceeding arising in the State Court where an assignment for the benefit of creditors had been made, that the claim of the City for sales tax was on the same parity as the claim of the State of New York for franchise tax, upon the theory that both claims depend upon the same sovereign right and that the City was acting as the agent for the State. On the same day which the Court of Appeals rendered its decision in *Matter of David Brown Printing Co. Inc.* (*supra*) it affirmed *Matter of Torpedo Dress*, 285 N. Y.—(March 6, 1941) which held that a claim of the State of New York for unemployment insurance taxes is entitled to priority over the claim of the City for sales tax, thus negativing the implication that the claim of the City is one for taxes entitled to the same parity as all taxes imposed by the State.

Jensen Candy Co. v. *State Tax Commission*, 90 Utah 359, has no application because the issue as to whether the obligation was a tax or a debt was not considered and the statute there involved is substantially different than the one at bar.

Barbee v. *Oklahoma Tax Commission*, 103 F. (2d) 114, is distinguishable for two reasons. The first reason is that the case was decided under the Bankruptcy Act as it existed prior to its amendment under the Chandler Act, whereas the instant case was decided under Bankruptcy Act as amended. This fact clearly appears in the decision of the District Court reported *sub nom. Matter of Kanaly*, 23 F. Supp. 995, 37 A. B. R. (N. S.) 588, wherein the

Court quotes the language of the Bankruptcy Act prior to its present amendment and further states as follows:

> "The question for determination is whether or not the claim for taxes, collected by the vendor, under the Bankruptcy Act, *constitutes a debt which is entitled to priority.*" (Italics ours.)

The issue, therefore, which was decided in *Barbee* v. *Oklahoma* (*supra*) was not whether the claim of the State of Oklahoma was a tax, but as the District Court there said whether the claim *"constitutes a debt which is entitled to priority"*.

The second reason is that it involves a different statute. The Oklahoma Sales Tax Law (Section 3, article 7, chapter 66, Session Laws 1935) expressly defines who is the taxpayer, as follows:

> "The term 'taxpayer' shall mean any person liable for any tax hereunder."

In the instant case, the New York statute does not define the term "taxpayer", but the statute has been construed both by the New York courts and by this very petitioner as making the purchaser the taxpayer and the vendor only a tax collector.

Colorado National Bank of Denver v. *Bedford*, 310 U. S. 41 we submit supports our view rather than that of petitioner. In that case the banks were required to collect from their customers a tax for the use of safe deposit boxes, to include such charge in the bills submitted to their customers, and to forward the collections to the State. This Court held that the user of the safe deposit box was the taxpayer and not the bank.

By analogy, the vendor under the Local Law, corresponds

to the bank in the *Colorado* case, and the purchaser to the user of the safe deposit box. The conclusion therefore follows that since the purchaser is the one ultimately liable for the tax, he is the taxpayer and not the vendor.

State Tax Commission v. *Spanish Fork,* 100 Pac. (2d) 575 has no application because the issue as to whether the obligation was a tax or a debt was not there involved or considered.

Foster v. *Miller,* 166 Ohio State 295 has no application for the same reason. Furthermore, the Ohio statute is different than the New York City Local Law as there the vendor is required to purchase prepaid tax receipts from the State of Ohio, and the effect thereof is to make the vendor pay to the State of Ohio the estimated amount of the tax even before the vendor makes any sales.

De Aryan v. *Akers,* 12 Cal. (2d) 781 is distinguishable in that the statute there involved is different. The statute there expressly provides that "The tax hereby imposed shall be collected by the retailer from the consumer insofar as the same can be done." It is to be noted the consumer is under no mandatory duty to pay, nor is he subject to the tax as under the New York statute.

Doby v. *State Tax Commission,* 234 Ala. 150 is inapplicable because the statute there involved is different. By Section 2 of the Alabama statute, there is levied:

> "(a) Upon every person, firm or corporation engaged or continuing within this State in business of selling at retail any tangible personal property whatsoever, including merchandise and commodities of every kind and character * * * an amount equal to two per cent. of the gross proceeds of sales of the business,

except where a different amount is expressly provided herein."

Under such language the retailer is the "taxpayer" even though he may be permitted to pass on the tax to the ultimate consumer, and the Alabama statute is therefore not comparable.

Nolte v. *Hudson Navigation Co.*, 8 F. (2d) 859 has never been over-ruled but to the contrary has repeatedly been cited with approval. In principle it is still good law because not only do courts continue to emphasize the distinction between a debt and a tax, but the Bankruptcy Act likewise makes that distinction. Taxes are granted priority under Section 64(a) (4) whereas debts which are entitled to priority under the laws of the United States are governed by subdivision 5 of Section 64(a).

POINT VI.

Public policy does not require a reversal of the judgment of the court below.

This is not a case which calls for a reversal of the judgment of the court below upon the ground of public policy or public interest.

(1)

The interest of general creditors motivated the amendment of Section 64 of the Bankruptcy Act.

It is common knowledge that state priorities have taken too great a toll from bankrupt estates to the detriment of the general creditor, and for that reason the National Bankruptcy Conference recommended that state priorities be

omitted from the Bankruptcy Act as amended by the Chandler Bill.

The Chandler Bill (H. R. 12889) was the result of a thorough study over a period of years by the National Bankruptcy Conference, a nationwide organization of persons who were connected with all phases of bankruptcy law and procedure, and Jacob I. Weinstein, Esq., and Reuben G. Hunt, Esq., were active members of said Conference.

In the 74th Congress, 2d Session, Committee Print, of the Analysis of H. R. 12889, introduced by Congressman Chandler, May 28, 1936, we find the statement of Mr. Weinstein at page 201 thereof as follows:

> "We have deleted all state priorities except in the case of a landlord, but have restricted that priority to rent for actual use and occupancy which accrued within three months before bankruptcy. Under the laws of many States a landlord is granted either a priority or a lien for rent. Many leases contain a clause permitting the acceleration of rent for an unexpired term. Therefore, landlords frequently present claims for rent for unexpired terms and obtain priority under their State laws. *The statistics gathered by the Attorney General indicate that rent claims consume a very substantial portion of an estate, and in smaller estates not infrequently use up all of the funds.* In some jurisdictions, where the rent has become a lien without the necessity of distraint before bankruptcy, the claim takes priority over all administration costs, including the costs of preserving the estate. Such a situation is inequitable. In Section 67(c) we make a similar provision to cover the claims of landlords which by State law are made liens, as distinguished from priorities.
>
> *"For like reasons of policy, we have excluded, as indicated, all other state priorities. The necessity for so doing is obvious; many estates have been consumed, to the exclusion of creditors, by the ever-increasing classes of state priorities."* (Italics ours.)

General creditors create the estate. The taxing authorities do not add one dollar to the estate. While credit is being extended, they delay the collection of taxes for a period of years, as in the instant case, and then demand priority of payment. This vicious practice is clearly expressed by Reuben G. Hunt, Esq., in his comments on tax claims in bankruptcy (quoted in *Matter of Raflowitz*, 43 A. B. R. (N. S.) 358) as follows:

> "When the tax collector finally swoops down, small estates are shorn more completely of their assets than in Biblical times when the locusts ate up all the honey, and the four winds of the earth could not accomplish a more complete devastation to the utter rout of the unsecured creditors.
>
> "The Bankruptcy Act was drafted with the principle that equality is equity in mind, but there has been a tendency in recent years for the typical bankruptcy proceedings to resolve itself into a process in which one preferred party after another slices off a portion of the available assets, with little or none remaining for distribution to general creditors. *This process ought not to be extended beyond the clear requirements of the controlling statutes.* Tuttle, *J.*, in *Matter of Standard Composition Co.*, 37 Am. B. R. (N. S.) 285, 292, 23 F. Supp. 391, 395." (Italics ours.)

General creditors as a large part of the public and especially the little business man selling to retailers, have a vital interest in the equitable distribution of a bankrupt's estate. This principle is generally recognized as an integral part of our economy. No impelling public policy requires that they be deprived of their dividend.

(2)

Section 64 of the Bankruptcy Act was deliberately amended to omit priority for debts owing to States other than for rent claims.

An omission of specific words from a statute is the equivalent of a statutory denial of rights flowing therefrom. This principle was recently enunciated in *In re Carden,* F. (2d) (C. C. A. 2nd) decided March 24th, 1941.

(3)

Public interest does not demand that the clear intent of the legislative body of City of New York be thwarted.

The proper forum for the relief now sought by petitioner is Congress or the legislative body of the City of New York.

Petitioner in its brief (p. 27) concedes that the intention of the law was to make the tax a consumer's tax so that the public would become conscious of what unemployment relief was costing the community.

Public interest does not demand an extension of the specific power granted to the municipality contrary to the express intent of the local legislative body.

(4)

Public policy does not require the creation of doubt and uncertainty as to established law and legal principles.

Established law should not be given a *"coup de grâce"* and placed "in repose" by the surreptitious seizure and hoisting of the "public policy" banner by one litigant to the exclusion of the other. Confusion and doubt as to the law can only follow in its wake. Such is not the policy of this Court.

Petitioner in the numerous cases in which it has appeared as a party has consistently taken the position and motivated the Courts to adjudicate that the Sales Tax was imposed on the purchaser.

Now petitioner would have this Court throw into discard the determination, and the expression in numerous opinions of the Courts of the State of New York and this Court, that the tax is on the purchaser.

If the Court below is affirmed, the judgment will be in harmony with adjudications heretofore made both by this Court and the Court of Appeals of the State of New York. If reversed, it will undoubtedly cast doubt upon decisions heretofore made by both the Federal and State Courts. It certainly will not be four square with the position heretofore taken by the City of New York both before this Court and the Courts of the State of New York.

CONCLUSION.

The order of the Circuit Court should be affirmed.

Respectfully submitted,

BENJAMIN SIEGEL,
Attorney for Trustee, Respondent.

BENJAMIN SIEGEL,
BENJAMIN BROWNSTEIN,
On the Brief.

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SUPREME COURT OF THE UNITED STATES.

No. 863.—October Term, 1940.

The City of New York, Petitioner, vs. Michael Feiring, Trustee in Bankruptcy of National Studios, Inc.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 26, 1941.]

Mr. Justice Stone delivered the opinion of the Court.

The question is whether the obligation imposed upon sellers by a New York City sales tax (No. 20, Local Laws of New York City, 1934, as amended, No. 24, Local Laws of New York City, 1934), to pay a tax laid upon receipts from sales of personal property and collectible alternatively from the buyer or the seller is a "tax" entitled to priority of payment in bankruptcy under § 64 of the Bankruptcy Act.

Petitioner, New York City, filed its claim against the estate of the bankrupt for taxes on sales of tangible property by the bankrupt during the five years following January 10, 1934. In the proceeding before the referee it appeared that the bankrupt had failed to collect most of the taxes from its buyers as required by the applicable law, and that the sole issue was with respect to the right of the City to priority of payment of the City's claim over those of general creditors. The District Court set aide the referee's order allowing the priority and the Court of Appeals for the Second Circuit affirmed, 118 F. (2d) 329, holding that the sum claimed was not a tax, but that the "bankrupt was liable to the city as a tax collector who owes as a debt the amount of taxes collected or to be collected". We granted certiorari April 14, 1941, because of the suggested failure of the court below to follow our decision in *New York City* v. *Goldstein*, 299 U. S. 522, reversing *Matter of Lazaroff*, 84 F. (2d) 982, and of the asserted conflict in principle of the decision below with that of the Court of Appeals for the Tenth Circuit in *Barbee, Trustee* v. *Oklahoma Tax Commission*, 103 F. (2d) 114.

Section 64 of the Bankruptcy Act, as amended June 22, 1938, 52 Stat. 840, 874, awards priority of payment, in bankruptcy, to

"taxes legally due and owing by the bankrupt to the United Stat or any state or any subdivision thereof . . ." Whether t present obligation is a "tax" entitled to priority within the mea ing of the statute is a federal question. *New Jersey* v. *Anderso* 203 U. S. 483, 491; cf. *Hormel* v. *Burnet*, 287 U. S. 103, 11 *Palmer* v. *Bender*, 287 U. S. 551, 555; cf. No. 393, *United Stat* v *Pelzer*, decided March 3, 1941. Intended to be nationwide in i application, nothing in the language of § 64 or its legislative hi tory suggests that its incidence is to be controlled or varied by t particular characterization by local law of the state's demand Hence we look to the terms and purposes of the Bankruptcy Act a establishing the criteria upon the basis of which the priority is t be allowed.

As was pointed out in *New Jersey* v. *Anderson, supra,* 491 the priority commanded by § 64 extends to those pecuniary burden laid upon individuals or their property, regardless of their consent for the purpose of defraying the expenses of government or o undertakings authorized by it. The particular demand for whic the City now claims priority of payment as a tax is created and defined by state enactment. We turn to its provisions and to the decisions of the state courts in interpreting them, not to learn whether they have denominated the obligation a "tax" but to ascertain whether its incidents are such as to constitute a tax within the meaning of § 64. Cf. *Morgan* v. *Commissioner*, 309 U. S. 78, 80, 81 and cases cited; *United States* v. *Pelzer, supra;* No. 495, *Ryerson* v. *United States*, decided March 3, 1941.

The present exaction is that which was considered, and its constitutionality sustained in *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33. The discussion of it there will be supplemented here only so far as is needful for the disposition of the issue now before us. It was enacted by the municipal assembly of New York City as an emergency revenue measure to defray the expense of unemployment relief, pursuant to authority conferred by the state legislature. Ch. 815, New York Laws 1933; Ch. 873, New York Laws 1934. Originally No. 24 of New York Local Laws, 1934, it has since been annually renewed with minor amendments not now material. Section 2 lays a tax upon receipts from retail sales in New York City of tangible personal property, and requires the seller, with exceptions not now material to charge the buyer with the amount of the tax, separtely from the sales price and to collect the tax from him.

Penalties are imposed by § 15 for the seller's willful failure to comply with these requirements. Section 2 also commands that the tax "shall be paid by the purchaser to the vendor for and on account of the City of New York". Section 5 requires the seller to file with the City Comptroller a "return of his receipts and of the tax payable thereon" for prescribed periods. Section 6 requires the seller, at the time of filing a return to pay to the Comptroller the taxes upon all receipts required to be included in his return and also provides that "all taxes for the period for which the return is required to be filed shall be due from the vendor and payable to the Comptroller on the date limited for the filing of the return for such period without regard to whether the return is filed or whether the return which is filed correctly shows the amount of receipts and taxes due thereon". But if the seller fails to collect the tax § 2 also makes it the duty of the purchaser to file a return with the Comptroller and commands that "such tax shall be payable by the purchaser directly to the Comptroller".

By § 8 whenever either the seller or purchaser "shall fail to collect or pay over any tax and/or to pay any tax" imposed by the law, the City is authorized to bring an action for its recovery or, as an alternative remedy, the Comptroller is authorized to issue a warrant directed to the sheriff of the county, commanding him to levy upon and sell the real and personal property of the seller or the purchaser and apply the proceeds to the payment of the tax. In construing these provisions the New York Court of Appeals has held that while the Comptroller may proceed under § 2 to collect the tax from the purchaser if he has not paid it to the seller, see *Matter of Kesbec, Inc.* v. *McGoldrick*, 278 N. Y. 293, the duty to pay the tax is also laid upon the seller w..ether he has in fact collected it and regardless of his ability to collect it from the buyer. *Matter of Atlas Television Co.*, 273 N. Y. 51; *Matter of Brown Printing Co., Inc.*, 285 N. Y. 47.

The statute thus contains provisions which in its normal operation are calculated to enable the seller to shift the tax burden to the purchaser, see *Matter of Kesbec, Inc.* v. *McGoldrick, supra*, 297; *Matter of Merchants Refrigeration Corp.* v. *Taylor*, 275 N. Y. 113, 124; cf. *McGoldrick* v. *Berwind-White Co., supra*, 43, 44. But it is plain that both the vendor and the vendee are made liable for payment of the tax *in invitum* without regard to those provisions by which the seller may shift the incidence of the tax to the

buyer and the tax may be summarily collected by distraint of the property of either the seller or the buyer. A pecuniary burden so laid upon the bankrupt seller for the support of government, and without his consent thus has all the characteristics of a tax entitled to priority of payment in bankruptcy within the meaning of § 64 of the Bankruptcy Act. *New Jersey* v. *Anderson, supra.* Cf. *United States* v. *Updike,* 281 U. S. 489, 494. It is not any the less a tax laid on the seller because the statute places a like burden in the alternative on the purchaser or because it affords to the seller facilities of which he did not avail himself to pass the tax on to the buyer. While an action in debt may be resorted to for the recovery of a tax it is evident that in this case the bankrupt is liable to the state only because it owes a tax. *Price* v. *United States,* 269 U. S. 492, 500; *Milwaukee County* v. *White,* 296 U. S. 268, 271.

In *New York City* v. *Goldstein, supra,* we reversed *per curiam,* citing *Matter of Atlas Television Co., supra,* a decision of the Court of Appeals for the Second Circuit that a claim of the City for payment of tax by the seller was not entitled to priority under § 64 of the Bankruptcy Act. The court below attributed our reversal to the circumstances that at that time, though not now, § 64 allowed priority to debts entitled to priority under state law, and to the decision of the state court in the *Atlas* case, that upon a general assignment for the benefit of creditors made under state law a claim against the seller for the sales tax was entitled to priority. But in placing this interpretation upon our decision in the *Goldstein* case the court below overlooked the fact that the Court of Appeals ruled in the *Atlas* case that an ordinary debt due the state is not entitled to priority by state law, and it sustained the priority in that case only on the ground that the demand was for a tax, the unqualified duty to pay which was placed by the statute on the seller. This interpretation of the state statute was reaffirmed by that court in the *Matter of Brown Printing Co., Inc., supra.* For reasons already given the duty imposed upon the seller by the taxing act thus construed is also a tax within the meaning of § 64 of the Bankruptcy Act.

Reversed.

Mr. Justice ROBERTS thinks the judgment should be affirmed for the reasons stated by the Circuit Court of Appeals.